Supreme Court, U.S.
FILED

06-104 JUL 17 2006

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Docket No. _____

IN THE

Supreme Court of the United States

John A. Lane, MD, FACOG,

Petitioner,

v.

Stephen J. Wilson, MD
Jock R. Wheeler, MD
Kris Lee Sperry, MD
Steven F. Gordon, MD

Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

Each of these four defendants testified as medical expert witnesses for the plaintiffs in a medical malpractice lawsuit. Herein I allege perjury and medical malpractice. All four defendants flat out lied about the timing of DIC (the medical condition which caused Johnetta's death). They unanimously testified that DIC began later than the truth. This does not involve opinions. This involves well-documented facts.

> Question #1: Does the Doctrine of Expert Witness Immunity allow expert witnesses to commit perjury?

> Question #2: When the facts of a case support a theory of conspiracy to fraud, does the Doctrine of Expert Witness Immunity shield expert witnesses?

Dr. Sperry upheld an uncompromising medical position which contradicted mainstream medical scientific thought. Dr. Wheeler misrepresented the standard of care. Dr. Wheeler also grossly misinterpreted simple and basic laboratory test results to the extent of willful deception. Dr. Wilson's testimony demonstrated brazen medical professional negligence.

> Question #3: Does rendering medical opinions in testimony constitute the practice of medicine?

> Question #4: With regard to caliber of professionalism, are physician expert witnesses held to a different standard than clinicians?

> Question #5: If found to be guilty of medical malpractice, are physician expert witnesses liable to the defendant, the plaintiff or both?...to the party paying them, that party's opponent, or both?

LIST OF PARTIES

Plaintiff:

John A. Lane, MD, FACOG
2301 Rexwoods Drive, Suite #114
Raleigh, NC 27607

Defendants:

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Jock R. Wheeler, MD
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Virginia Beach, VA 23454

Steven F. Gordon, MD
49 Islander's Retreat
Savannah, GA 31411

Kris Lee Sperry, MD
99 Wynn's Pond Road
Sharpsburg, GA 30277

BASIS FOR JURISDICTION

The United States Supreme Court has jurisdiction because the United States Court of Appeals for the Fourth Circuit issued a judgment on February 28, 2006, which affirmed the judgment of the United States District Court for the Southern Distr[illegible] of West Virginia, which granted the defendants' motions to dismiss. Subsequently, on April 18, 2006, the United States Court of Appeals for the Fourth Circuit ordered a denial to my timely petition for re-hearing.

The legal basis of my lawsuit rests upon the common law premise that it is patently illegal to tell lies while testifying under oath. Serving as an expert witness should not elevate one to be above the laws on perjury.

I also advance the premise that expert witnesses should be held to the same standards of professionalism as clinicians. I submit that our government has a duty to protect the public from malfeasance by physicians as they render medical opinions. It should not matter if the venue of this medical opinion is in patient care at the bedside or in testimony as an expert. As a consequence of this, I assert my rights to sue these expert witnesses for medical malpractice.

Explanation of Jurisdiction of Court of First Instance

I filed this lawsuit in the United States District Court for the Southern District of West Virginia because of diversity....i.e. the defendants lived outside of West Virginia.

TABLE OF CONTENTS

Questions Presented for Review	**i**
List of Parties	**ii**
Basis for Jurisdiction, Jurisdiction of First Instance	**iii**
Facts	**1**
Argument	**5**
Reasons to Grant Certiorari	**8**
Appendix A – Laboratory Test Results at 15:05	**11**
Appendix B – Timeline of Critical Clinical Events	**12**
Appendix C – DIC Testimony	**13**
Appendix D – Excepts from Analysis of National Registry of Amniotic Fluid Embolism; Dr. Sperry's Testimony	**17**
Appendix E – Recommendation of the Magistrate Judge	**19**
Appendix F – District Court Ruling	**25**
Appendix G – Appellate Court Affirmation	**29**
Appendix H – Denial of Rehearing	**32**

FACTS

My patient Johnetta's, clinical course was essentially routine in all respects throughout a planned repeat Cesarean section and into the early postoperative time period...with one exception...in surgery I observed and described obviously enlarged ovarian veins; and formed the clinical impression of blood clots having been within these enlarged veins.... i.e. 'ovarian vein thrombosis'. At approximately 14:45 (an hour and 45 minutes after surgery), Johnetta had a normal mental status and normal vital signs.... i.e. was clinically normal in all respects. She complained of some abdominal pain and was left unattended for approximately four to five minutes as her nurse prepared a pain shot for her. Upon return, the nurse found Johnetta to be comatose and in cardiopulmonary arrest at 14:50. Within 15 minutes of this time, at 15:05, laboratory testing clearly documented a massive loss of blood and disseminated intravascular coagulation (DIC). DIC essentially amounts to the destruction of the blood clotting system. DIC is commonly fatal. The timing of these lab tests at 15:05 is critical and central to understanding this lawsuit. Twenty-five minutes later, at 15:30, a hysterectomy was started, hoping to control bleeding from inside of the uterus. At 17:30 surgery was completed. Despite massive efforts, Johnetta never regained a functional blood clotting system and died as a result of irreversible DIC at 05:50 the next morning. All experts, both defense and plaintiff, agreed that Johnetta succumbed to irreversible DIC. If DIC could have been prevented or corrected, Johnetta would not have died. The timing of the following five clinical events is critical to understanding this lawsuit:

11:23 – 12:00... Cesarean Section Start/Stop Times
14:50..... Cardiopulmonary Arrest
15:05..... Severe Advanced DIC Documented
15:30 – 17:30... Hysterectomy Start/Stop Time
05:50..... Death

The truth is that DIC had to have begun sometime prior to 15:05 because the laboratory testing documented that DIC was already severe and in an advanced state at 15:05.

Dr. Wilson and Dr. Gordon both placed the onset of DIC at a point in time after the uterus had been removed... i.e. approximately 17:00.

Dr. Sperry placed the onset of DIC in the same timeframe as Dr. Wilson and Dr. Gordon, however he did it with subtlety and nuance. He did this by stating that "significant hemorrhage" became evident late in the cardiac code, which he falsely stated lasted over two hours. The truth is that the cardiac code began at 14:50 and ended before the hysterectomy was started at 15:30. Dr. Sperry's testimony would indicate that DIC began at approximately 16:30 – 17:00.

When Dr. Wheeler was asked about the onset of DIC, he was less specific...testifying that DIC occurred sometime after 15:05. To my astonishment, Dr. Wheeler stated specifically that the laboratory test results at 15:05 did not indicate DIC. This is outlandish. Yet, interestingly, this testimony is entirely consistent with the testimony of the other three defendants with regard to the timing of DIC.

To summarize, every single defendant just plain lied about the well-documented time of onset of DIC, all of whom placed the beginning of DIC later than the truth. These lies revolve around fact not opinion. This is essentially one lie told by all four witnesses.

Medical professional negligence is obvious, as Dr. Wilson admitted that he did not even look at the wildly abnormal lab values in Johnetta's medical record. Clearly, this is negligence of a heinous degree considering the central importance of the wildly

abnormal laboratory tests. D[illegible]lson's lack of familiarity with the medical record was almost comical when he accused me of medical malpractice for care given during a brief antepartum hospitalization when my call-partner, Dr. Jones, was in complete control of patient management.

Dr. Sperry grossly misrepresented the medical literature by testifying that in Johnetta's case, DIC could not be explained by a syndrome known as amniotic fluid embolism. It is a fact that Johnetta did not have histologic evidence of amniotic fluid embolism. Dr. Sperry stated that, in the absence of histologic evidence, amniotic fluid embolism syndrome simply could not be said to have existed and thus could not have been the cause of DIC in Johnetta. This testimony is in direct contradiction to mainstream, peer-reviewed, American medical literature, which holds that histologic evidence is not necessary to make the diagnosis of amniotic fluid embolism syndrome. This absolutist, uncompromising, contrarian opinion was represented by Dr. Sperry as though it was mainstream thinking. A truthful doctor would regard this as fraud.

Dr. Wheeler upheld the opinion that heparin as first-line treatment for ovarian vein thrombosis was substandard. He said that Johnetta should have had a lifelong permanent filter device placed into the largest vein in her body without the benefit of first treating with heparin medicine. This directly violates the actual standard of care in the most basic of ways. The widely recognized standard of care throughout the world is to treat ovarian vein thrombosis with heparin first and to reserve the placement of a filter device only when heparin fails. On this point, Dr. Wheeler is flagrantly wrong. The medical literature is abundantly clear on this point. I could provide innumerable references from journals and textbooks. This is a gross misrepresentation of the standard of care. To give an opinion such as this is medical malpractice.

Nowhere in any of the proceedings in this lawsuit have my opponents disputed, denied or rebutted any of my accusations in any way, shape, manner, or form. Their strategy has been directed down other avenues.

ARGUMENT

The opposing sides essentially proffered two medical theories: 1) Amniotic fluid embolism (consistent with the facts) and 2) pulmonary embolism (not consistent with the facts).

Amniotic fluid embolism is a rare event consisting of profound ill effects in the mother in response to a rather common occurrence...i.e. the entry of water from around the baby (amniotic fluid) into the maternal blood stream. Amniotic fluid can incite an anaphylactic reaction similar to snake or bee venom, but with the addition of DIC as a prominent feature. Clinically, one observes sudden cardiopulmonary arrest in association with DIC. This is precisely what was documented clearly in Johnetta's medical record. The simultaneity of these two events is a crucial aspect, which distinguishes amniotic fluid embolism from the pulmonary embolism theory.

Pulmonary embolism occurs when blood clots from large caliber veins break loose into the blood stream and travel to the pulmonary arteries and inevitably obstruct blood flow to the lungs. Unquestionably, if the clot(s) is (are) large enough, this will cause sudden cardiopulmonary arrest as observed in Johnetta. Pulmonary embolism obviously is a complication of excessive clotting. DIC is at the opposite end of this same spectrum. Pulmonary embolism is not, IS NOT, associated with DIC. This point cannot be overemphasized. Pulmonary embolism certainly can initiate a sequence of events, which may lead to DIC. This was my opponent's theory. Simply stated: They maintained that filter placement, as testified by Dr. Wheeler, would have prevented pulmonary embolism; which would have averted cardiopulmonary arrest; which then led to uterine muscle relaxation; which then caused uterine bleeding; which then indicated the hysterectomy with more bleeding; which then resulted in DIC, the agreed upon cause of ultimate demise. In plain and simple English, Dr. Wheeler's position that filter placement was indicated before a trial

of heparin therapy was misrepresentation of the actual standard of care of such great proportion as to constitute fraud.

Denigration of the amniotic fluid embolism theory came in the form of Dr. Sperry's absolute dismissal of the possibility of amniotic fluid embolism based on heretofore mentioned lack of histological evidence. In fact, the largest study on amniotic fluid embolism in many years flatly contradicts Dr. Sperry's position. The *American Journal of Obstetrics and Gynecology* published an article titled Amniotic Fluid Embolism: Analysis of the National Registry[1]. In this landmark study, they had a 27% rate of lack of histologic evidence found in strictly defined cases of amniotic fluid embolism. This is no small number. It was medical malpractice for Dr. Sperry to represent his militantly extreme, uncompromising, and absolutist contrarian position as though this was mainstream medical thinking. Reputable physicians would agree that this was outright fraud.

My opponent's largest problem with the truth was the documented fact that DIC either preceded or was coincident with the cardiopulmonary arrest. Herein lies the crux of this lawsuit. No medical doctor would, in their wildest dreams or most remote speculation, theorize that pulmonary embolism and DIC would occur simultaneously. My opponent's medical theory required DIC to appear later than cardiopulmonary arrest (which supposedly was caused by pulmonary embolism.) It is overwhelmingly obvious that, when my opponents were presented with this dilemma, the remedy chosen was simply to alter the sequence of clinical events. They testified that DIC occurred long after the cardiopulmonary arrest. This was perjury. This was not a difference of opinion on management. It was not a debate about what the literature may or may not support. They lied about the timing of the cause of death. By placing the onset of DIC long

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[1] Clark SL, Hankins GD, Dudley DA, et al: Amniotic fluid embolism: analysis of the national registry. Am J Obstet Gynecol 1995 Apr; 172 (4 Pt 1).

after the actual timing, clinically they could ascribe a different etiology, and by extension a different course of management. This delay in timing of DIC was requisite to their theory.

One by one, they each treated DIC as though it was a downstream sequela of cardiopulmonary arrest, instead of being pre-existent or coincident. It makes absolutely no sense whatsoever to believe that all four experts would make the same misstatement of fact by chance or accident. This has all the stigmata of conspiracy.

REASONS TO GRANT WRIT OF CERTIORARI

Herein, I have basically alleged two forms of injustice: perjury and medical malpractice - perjury consisting of the testimony regarding the timing of DIC; medical malpractice consisting of the heretofore described misrepresentation of standards of care and evidence in literature, misinterpretation of blood test data, and sheer negligence. The perfect truth is a convoluted blend of medical malpractice, fraud, outright perjury, and, in all likelihood, conspiracy.

The Honorable Judge Joseph R. Goodwin dismissed this lawsuit on the doctrine of absolute expert witness immunity:

> "Regardless, these defendants are entitled to the defense of absolute immunity to all claims arising out of their expert opinion testimony in the former trial. It is well established that the doctrine of witness immunity shields expert witnesses from liability arising out of their opinion testimony in judicial proceedings."

If expert witnesses have absolute immunity, first impression might suggest that we should stop administering the oath to this supra class of citizens. If the government will not allow prosecution in court for perjury, why pretend that expert witnesses are subject to the laws of perjury? A closer scrutiny of this situation shows it to be even more unjust. By administering the oath with no intention of enforcing it, the court actively creates deceit by deluding the jury into believing that expert witnesses are bound by the law of perjury. In this scenario justice would be better served if the reality of expert witness immunity were to be told to the jury by the presiding judge. This openness on the part of the court would bring an uneven playing field a small bit closer to balance. Better yet, bring down this super class of citizenry back into equality with the rest of us Americans by curtailing their immunity in a prudent manner. Let absolutism in expert witness

immunity be a thing of the past. The implications of this are truly of national significance. Absurdities such as this are rampant in medical malpractice litigation.

No legislature ever voted to grant expert witnesses absolute immunity. No responsible jurist ever intended for expert witness immunity (while laudable for myriad reasons) to evolve into a doctrine used to condone perjury or flagrant medical malpractice. Absolutism is antithetical to checks and balances. No one should be above the law. Expert witness immunity creates inequality among witnesses. This violates our constitution, which holds that all men are created equal. Expert witness immunity makes perjury a tool in civil litigation. Expert witness immunity allows absurd medical opinions to be legally applicable and on an even footing with legitimate medical thinking.

I propose the simple doctrine; that a medical opinion generated for the purpose of testimony be held to the same standards of professionalism as medical opinions generated by clinicians. In clinical practice, one should never do anything one cannot defend. The same standard should apply to expert witnesses. It is far too common an occurrence in America for bogus testimony to come from doctors testifying to agreed upon concocted medical theories. These doctors profit by selling their medical credentials in a corrupt fashion. Stripping expert witnesses of absolute immunity would serve to lessen bogus testimony.

The incontrovertible nature of the lies in testimony regarding DIC facts provide this most honorable Court with the opportunity to focus on the absurdity engendered by absolute expert witness immunity. The DIC testimony and the actual facts allow these witnesses virtually no wiggle room. They simply cannot deny that they lied. There could hardly exist a set of circumstances that could better crystallize the issue of the absurdity of absolute witness immunity. We have here perjury, through and through.

I can only beg this most honorable Court to consider these issues. Government-protected liars are not the stuff of truth and justice. If this most honorable Court agrees with me on these issues, and rules accordingly, absurdities in medical testimony will decrease. Crazy medical malpractice awards will decrease. Healthcare expenditures nationally will decrease. By extension, the net result down the road will be an improved national economy and a stronger America...lest not we forget more truth and by direct consequence more justice.

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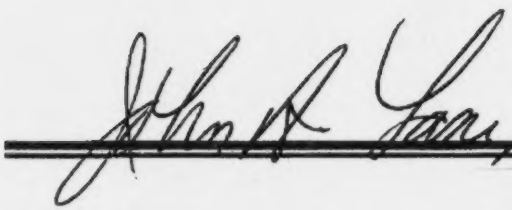

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APPENDIX A
LABORATORY TESTING AT 15:05

TEST	RESULT AT 15:05	VALUES BEFORE CESAREAN	NORMAL VALUES
PTT	120.7	Not routinely done	21.8 – 29.6
PT	19.2		9.5 – 11.9
Platelets	43	Not routinely done	140 – 450
Hemoglobin	4.6	182	12.0 – 15.0
Hematocrit	14.5	10.3 32.3	36.0 – 47.0

These PTT, PT and platelet values at 15:05 leave no shadow of a doubt that DIC was in an advanced and severe state at this point in time. This pattern of increased PT and PTT and decreased platelets, hemoglobin and hematocrit are classic for DIC. The extent to which all of these test results deviate from normal is alarmingly great and indicative of an extreme state of illness. These are simple basic fundamental tests, which are commonly performed and familiar to all physicians. That these tests prove advanced DIC is plainly and overwhelmingly evident to anyone with a medical background.

APPENDIX B
TIMELINE OF CRITICAL CLINICAL EVENTS

11:23 – 12:00	Cesarean section start and stop times
14:50	Cardiopulmonary arrest
15:05	Severe advanced DIC documented
15:34 – 17:50	Hysterectomy start and stop times
05:50	Death

APPENDIX C
THE DIC TESTIMONY:
EXCERPTS FROM THE DEPOSITIONS

Dr. Wilson

Page 133
Question: Were you able to identify at what point in time she may have entered DIC?

Answer: Apparently, it was after the uterus was taken out.

Page 137
Question: A determination of when the DIC may have started, would that in any way have impacted your opinions on how Ms. Mitchell's situation should have been addressed?

Answer: Given the DIC started after the hysterectomy was done, no.

Question: Now, how certain are you that it started after the hysterectomy?

Answer: From the two typewritten notes.

Question: So, it is just based on that that you conclude that that is when the DIC started?

Answer: Yes.

Dr. Gordon

Page 70
Question: Do you have a sense for when this patient went into DIC?

Answer: Yes.

Question: From the record?

Answer: It happened sometime in between when shortly after the uterus was removed. I do not think it had anything to do with the removal of the uterus, but I think time-wise if what you are asking me?

Question: Yes, sir.

Answer: That is when it happened.

Dr. Sperry

Page 74
Answer: ...and then at 14:50 hours, which was not quite 2-1/2 hours after the baby was delivered, she was found to be unresponsive, and a very prolonged resuscitative code ensued that went past 17:00. So, it was over 2 hours, during which time she was very aggressively resuscitated, and she also became very, very acidotic during the course of this.

The truth is that the resuscitative code ended before 15:34 when the hysterectomy began.

Page 78
Well, up in the time that really they took her back – Well, I would say up until the time the latter part of the code really was, I would say, progressing, there was not any evidence that I recall of significant hemorrhage...

Page 75
.... So, an emergency hysterectomy was undertaken in that this was accomplished during the course of which there were some problems with one of the vascular pedicles and some additional hemorrhage. She also was administered large quantities of blood and blood products to treat what was, I think appropriately, thought

to be disseminated intravascular coagulation at the time, but she survived the surgery but then died the next morning from the unremitting complications of really cardiovascular shock and DIC, so that is a thumbnail at least.

Dr. Wheeler

Page 106
Question: And I guess my question here, doctor, is when we talk about it in this instance what I am asking you is for the pulmonary embolism to be - - the DIC to be the result of the cardiopulmonary collapse that you are indicating - - I am asking you to identify for me if you can the timing you would anticipate for the DIC to hit.

Answer: I cannot give you a specific number.

Question: Can you tell me based on your review of the lab values, including this lady's blood testing, when you - - it may have hit?

Mr. Michael: You are talking about DIC?

Mr. Woods: DIC.

Question: Doctor, I want you to look at April 1st, 15:05, can you tell me what it was - - if you analyze those laboratory values?

Answer: All right. I have these numbers in front of me.

Mr. Michael: What is the question?

Question: My question is: Did you during the course of your review analyze those documents - - those values in attempt to interpret them?

Answer: I did analyze these. I did not try to interpret them based on what I thought was her appropriate treatment.

Question: Can you tell me whether or not there is anything there that indicates to you whether or not she was in DIC at that time?

Answer: There is no confirmatory evidence to show she is in DIC at that particular time.

Question: All right. Let's go over to the next page where we have the hematology studies, doctor. Did you analyze what, if anything, was meant by the hematocrit and hemoglobin levels and the platelet counts at that time?

Mr. Michael: At what time? At 15:05?

Mr. Woods: Yes, 15:05.

Answer: The hemoglobin is significantly reduced. The hematocrit is significantly reduced as compared to previous studies. The platelet count is significantly reduced.

Question: What significance, if any, did you attach to that?

Answer: That this patient has lost blood, that the hemoglobin and hemoglobin capacity to carry oxygen in the blood was reduced. Blood volume - - I am not sure how much the blood volume was down based on these preliminary studies, although I would expect it to be reduced.

Question: Did you interpret that to mean anything in terms of DIC or anything as to when she entered it?

Answer: Not as to when she entered it, no. I cannot interpret when she entered into a state of DIC. Subsequent studies show that she was - - that she had a clinical state of DIC. Interestingly enough, I have no way to put a time, a specific time, on this.

APPENDIX D
EXCERPTS FROM ANALYSIS OF THE NATIONAL REGISTRY OF AMNIOTIC FLUID EMBOLISM; DR. SPERRY'S TESTIMONY

The analysis of the National Registry of Amniotic Fluid Embolism involved the National Registry which collected 69 charts of suspected cases of amniotic fluid embolism. 46 charts met criteria for inclusion in this study. The results of this National Registry were divided into eight compartments as follows: 1) Demographic Data, 2)Timing of Amniotic Fluid Embolism, 3) Labor Characteristics, 4) Membrane, Placenta, and Amniotic Fluid Status, 5) Clinical Features of the Amniotic Fluid Embolism Syndrome, 6) Maternal Outcome, 7) Neonatal outcome, 8) Histologic Findings. What follows will be the section on histologic findings in its entirety as published in the April 1995 issue of the American Journal of Obstetrics and Gynecology.

Histologic Findings

Autopsy was performed in 22 of 46 patients. Presumed fetal elements were identified in the pulmonary vasculature in 16 of 22 patients (73%). Fetal elements were sought by histologic examination of distal port pulmonary artery catheter blood in eight cases and were detected in 4 out of 8 (50%). Positive findings were encountered in 3 out of 6 patients (50%) with meconium staining before the event compared with 13 out of 34 (38%) patients with clear fluid before the amniotic fluid embolism. This difference did not reach statistical significance. Histologic debris of presumed fetal origin included squamous cells, hair, fat, droplets, trophoblasts, "non-specific cellular debris," and non-specific proteinaceous, keratinaceous, or

mucinous material. In only 1%, a woman with meconium-stained amniotic fluid, were the histologic findings described as "vessels occluded with squames."

Excerpts From Dr. Sperry's Testimony:

Page 66, Line 21-Page 67, Line 17

"...the question of amniotic fluid embolism arises. If I am completely unable to find any amniotic fluid elements in the lungs, I would not ascribe the death to amniotic fluid embolism, despite even perhaps what might be otherwise convincing clinical parameters that at least brought out a high suspicion that amniotic fluid embolism (AFE) occurred.

In other words, you cannot have an amniotic fluid embolism without having the embolism that one sees, and the debris will stay in the lung for many, many days, even weeks...so I could not reach a diagnosis of amniotic fluid embolism without the presence of amniotic fluid."

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON

JOHN A. LANE, M.D., FACOG

Plaintiff

v.

Civil Action No. 2:04-01255

STEPHEN J. WILSON, M.D.,
JOCK R. WHEELER, M.D.[1],
KRIS LEE SPERRY, M.D. and
STEVEN F. GORDON, M.D.,

Defendants.

PROPOSED FINDINGS AND RECOMMENDATION

Pending are the Motion to Dismiss, filed on December 20, 2004, by defendants, Jock R. Wheeler, M.D., Kris Lee Sperry, M.D., and Steven F. Gordon, M.D. (docket sheet document #9), and the Motion to Dismiss, filed on January 21, 2005, by defendant Stephen J. Wilson, M.D. (#14). This matter was referred to the undersigned United States Magistrate Judge for the submission of proposed findings and a recommendation for disposition, pursuant to 28 U.S.C. § 636 (b) (1) (B).

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[1] The undersigned notes that the Clerk listed this defendant as "Jack" Wheeler. The Clerk is directed to modify the docket to correct the misnomer.

PROCEDURAL HISTORY

Plaintiff filed the instant Complaint on November 24, 2004. (#1). The Complaint alleges that the defendants, who served as expert witness for the plaintiffs in a medical malpractice action brought against Plaintiff in the Circuit Court of Kanawha County (Mitchell v. Lane, Civil Action No. 99-C-715), committed the tort of outrage and medical malpractice through their testimony. (#1 at 7-16).

On December 20, 2004, defendants Jock R. Wheeler, M.D., Kris Lee Sperry, M.D. and Steven F. Gordon, M.D. filed a Motion to Dismiss (#9) and a Memorandum of Law in support thereof (#10). On January 21, 2005, following Plaintiff's second attempt at service of process, defendant Stephen J. Wilson, M.D. filed a Motion to Dismiss (#14) and a Memorandum of Law in support thereof (#15). The motions assert that Plaintiff's tort of outrage claims are untimely, that the defendants are immune from liability, and that Plaintiff did not provide notice to the defendants of his intent to bring medical malpractice claims against them as required by West Virginia law.

On January 28, 2005, Plaintiff filed a response in objection to the defendants' Motion to Dismiss, asserting that his claims are timely, that the defendants are not immune from liability, and that he is further asserting claims of negligence, misrepresentation/fraud/deceit, defamation, libel, and slander. (#16). On February 8, 2005, the defendants filed a reply brief (#19), which asserts, inter alia, that Plaintiff has not alleged fraud and misrepresentation with particularity. Without authorization, Plaintiff filed a sur-reply on February 23, 2005 (#20). The matter is now ripe for determination.

STANDARD OF REVIEW

Defendants have filed a Motion to Dismiss pursuant to Rule 12 (b) (6) of the Federal Rules of Civil Procedure. "For purposes of a motion to dismiss, the Complaint must be construed in a light most favorable to the plaintiff and its allegations taken as true. Only when it appears that the plaintiff could prove no set of

facts in support of its claims which would entitle it to relief should the motion be granted." Brock & Davis Co. v. Charleston Nat'l Bank, 443 F. Supp. 1175 (S.D. W. Va. 1977); Randall v. United States, 30 F. 3d 518 (4th Cir. 1994).

ANALYSIS

Citing the decision in Davis ex. Rel. David v. Wallace, 565 S.E.2d 386 (W. Va. 2002), the defendants assert that they are immune from liability on Plaintiff's claims because "conduct in serving as expert witnesses does not give rise to a cause of action as alleged in the Complaint." (# 10 at 3; # 15 at 3). In Davis, the appellant had sued an opposing party's expert witnesses for negligence and malpractice, arguing that "expert witnesses who commit negligence in pre-trial preparations of reports and on the witness stand should be held liable for their mistakes." 565 S.E.2d at 389.

The Supreme Court of Appeals of West Virginia (hereinafter the "SCAWV") held as follows concerning this novel legal theory:

> The law regarding witness immunity is sparse in West Virginia, and the issue of expert witness immunity has not been addressed by this Court. Historically, in West Virginia and in other jurisdictions, witnesses have been regarded as having an absolute immunity regarding their testimony given during trial.
>
> * * *
>
> However, an emerging body of case law and scholarly work questions the granting of absolute immunity to expert witnesses for in-court testimony or out-of-court preparations for trial including compiling data and generating reports [citations omitted].
>
> * * *

> West Virginia law is not settled in the area of expert witness immunity and, at this time, we are not addressing the issue of witness immunity. We are simply addressing whether a trial judge, who correctly identified the current state of law in West Virginia, abused his discretion by sanctioning a litigant and her attorney for expounding a novel cause of action that is not currently recognized in West Virginia.

Id. At 389-91 (emphasis added).

Plaintiff contends that this is an "open and unsettled question" and that "the framers of our constitution and our elected legislators did not intend to create a legal justice system in which a witness could lie and go unpunished." (# 16 at 3). Plaintiff asserts that the defendants misrepresented the conclusion reached in Davis as "a precedent setting case in support of immunity for expert witnesses" and that the "true conclusion of the Davis case is the exact opposite." (Id. At 2).

In their reply, the defendants state:

> A simple reading of this case as well as the concurring opinion indicates there can be no suit against a witness by a party in a former suit. As further proof one need only read the concurring opinion of Justice Starcher. In Davis, Justice Starcher stated, "[t]he majority opinion clearly acknowledges that there is not a cause of action for suing an opposing party's expert witness in West Virginia, and there is absolutely no language in the majority opinion that advocates for the creation of such a claim." Id. At 276. (emphasis in original).

* * *

> The concurring opinion of Justice Starcher merely shows other states have modified their laws regarding immunity. However, West Virginia has not, and the

Defendants are granted absolute immunity for their testimony.

(# 19 at 3-4).

In his response, Plaintiff contends that, "[t[he Complaint asserts facts which give rise to liability of the Defendants to Lane for negligence, misrepresentation/fraud/deceit, defamation, libel, slander, medical malpractice and the tort of outrage." (#16 at 1). A careful review of the allegations contained in the Complaint, however, indicates that Plaintiff has not properly pled any claims of fraud, misrepresentation, deceit, or defamation.

Moreover, all of the allegations in Plaintiff's Complaint revolve around testimony provided by the defendants as expert witnesses in a medical malpractice action in Kanawha County Circuit Court. The holding in Davis, discussed above, clearly indicates that, under West Virginia law, witnesses enjoy absolute immunity concerning their testimony, and that a cause of action against an expert witness is not presently recognized in West Virginia.

For these reasons, the undersigned proposes that the presiding District Judge **FIND** that the defendants are each entitled to absolute immunity on Plaintiff's claims. Therefore, it is respectfully **RECOMMENDED** that the presiding District Judge **GRANT** the defendants' Motions to Dismiss for failure to state a claim upon which relief can be granted. (## 9 and 14). Because the undersigned has recommended that the presiding District Judge dismiss the Complaint against each of the defendants based upon absolute immunity, the undersigned will not address the defendants' other arguments.

The parties are notified that this Proposed Findings and Recommendation is hereby **FILED**, and a copy will be submitted to the Honorable Joseph R. Goodwin, United States District Judge. Pursuant to the provisions of Title 28, United States Code, Section 636 (b) (1) (B), Rule 8 (b) of the Rules Governing Proceedings in the United States District Courts Under Section 2255 of Title 28,

United States Code, and Rule 45 (e) of the Federal Rules of Criminal Procedure, the parties shall have three days (mailing/service) and then ten days (filing of objections), from the date of filing this Proposed Findings and Recommendation within which to file with the Clerk of this Court, specific written objections, identifying the portions of the Proposed Findings Recommendations to which objection is made, and the basis of such objection. Extension of this time period may be granted for good cause shown.

Failure to file written objections as set forth above shall constitute a waiver of de novo review by the District Court and a waiver of appellate review by the Circuit Court of Appeals. Snyder v. Ridenour, 889 F.2d 1363 (4th Cir. 1989); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F. 2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984). Copies of such objections shall be served on opposing parties, Judge Goodwin and this Magistrate Judge.

The Clerk is directed to file this Proposed Findings and Recommendation and to mail a copy of the same to Petitioner and counsel of record.

April 13, 2005
Date

s/Mary E. Stanley
United States Magistrate Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON

JOHN A. LANE, M.D., FACOG,
Plaintiff,

v.

CIVIL ACTION NO. 2:04-cv-01255

M.D. STEPHEN J. WILSON, et al.,
Defendants.

MEMORANDUM OPINION AND ORDER

Pending are motions to dismiss filed by Jock R. Wheeler, M.D., Kris Lee Sperry, M.D., Steven F. Gordon, M.D. (Docket # 9), and by Stephen J. Wilson, M.D. (Docket # 14), filed on December 20, 2004, and January 21, 2005, respectively.

This action was referred to the Honorable Mary E. Stanley, United Stated Magistrate Judge, for submission to this court of proposed findings of fact and recommendation for disposition, pursuant to 28 U.S.C. § 636(b)(1)(B). The Magistrate Judge has submitted findings of fact and recommends that the court grant the defendant's motions to dismiss the complaint, based on a finding that the defendants are entitled to the defense of absolute immunity.

The plaintiff has submitted written objections to the magistrate's proposed findings of fact and recommendations and this court reviews those objections *de novo.* In his written objections, plaintiff alleges that defendants committed the tort of outrage and medical malpractice by conspiring to lie in their testimony as expert witnesses in a medical malpractice action brought against the plaintiff. As justification for the allegations in the complaint, plaintiff contends that, he believes the medical data in the previous case to have been unambiguous, the defendants

interpretations of that medical data therefore amounted to either incompetence or bad faith.

Regardless, these defendants are entitled to the defense of absolute immunity to all claims arising out of their expert opinion testimony in the former trial. It is well established that the doctrine of witness immunity shields expert witnesses from liability arising out of their opinion testimony in the judicial proceedings. See *Briscoe v. LaHue*, 460 U.S. 325, 333 (1983) (embracing the policies behind common law witness immunity as a rationale for expert witness immunity.)

However, our legal system, in response to the burgeoning complexities of our society, has come to rely so heavily on expert witness testimony that it has spawned a small cottage industry in the field. The emergence of this trend has led several jurisdictions to consider adopting the principle that expert witnesses who are paid for their opinion testimony in judicial proceedings, and fail to perform their services in a reasonable manner, may be liable *to the persons who hired them*, for professional negligence. The rationale for this development is that experts, because they are paid for their ability to research and understand a complex problem, should be required by the law to perform their task in a reasonable and workmanlike manner. In his objection to the proposed findings and recommendation of the Magistrate Judge, plaintiff attempts to convert this relatively new and irregularly embraced legal hypothesis into a rationale for a cause of action for outrage and medical malpractice against *an adversary's* expert witness. However, the motives and conditions behind the caselaw which supports re-analyzing the traditional approach to expert witness immunity are entirely distinct from those of the case at bar. In short, there is simply no basis in public policy, or West Virginia law, to support abandoning traditional notions of expert witness immunity and allowing plaintiff's cause of action to proceed. Therefore, this court **FINDS** that plaintiff's objections are without merit.

Accordingly, the court **ACCEPTS** and incorporated herein the findings and recommendation of the Magistrate Judge and **GRANTS** the defendant's motions to dismiss [Dockets # 9 and 14].

The court **DIRECTS** the Clerk to send a certified copy of this written opinion and order to Magistrate Judge Stanley, counsel of record, and any unrepresented party.

ENTER: August 26, 2005
Joseph R. Goodwin
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON

JOHN A. LANE, M.D., FACOG,
Plaintiff,

v.

CIVIL ACTION NO. 2:04-cv-01255

M.D. STEPHEN J. WILSON, et al.,
Defendants.

JUDGMENT ORDER

In accordance with the accompanying order of this date, the court **ORDERS** that judgment be entered in favor of the defendants and that this case be **DISMISSED** and **STRICKEN** from the docket of this court.

The court **DIRECTS** the Clerk to send a certified copy of this Judgment Order to counsel of record and any unrepresented party.

ENTER: August 26, 2005
Joseph R. Goodwin
United States District Judge

APPENDIX G

JUDGMENT

FILED: February 28, 2006

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

No. 05-2092

CA-04-1255-2

JOHN A. LANE, MD, FACOG

Plaintiff – Appellant

v.

STEPHEN J. WILSON, MD; JOCK R. WHEELER, MD; KRIS LEE SPERRY, MD;
STEVEN F. GORDON, MD

Defendants – Appellees

Appeal from the United States District Court for the Southern District of West Virginia at Charleston

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In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Conner
CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-2092

JOHN A. LANE, MD, FACOG,

Plaintiff – Appellant,

Versus

STEPHEN J. WILSON, MD; JOCK R. WHEELER, MD; KRIS LEE SPERRY, MD; STEVEN F. GORDON, MD,

Defendants – Appellees.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Joseph Robert Goodwin, District Judge. (CA-04-1255-2)

Submitted: February 23, 2006
Decided: February 28, 2006

Before WIDENER, NIEMEYER, and KING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

John A. Lane, Appellant Pro Se. Ancil Glenn Ramey, STEPTOE & JOHNSON, Charleston, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36 (c).

PER CURIAM:

John A, Lane, appeals the district court's order adopting the magistrate judge's recommendation to grant the Appellants' motion to dismiss in this civil case. We have reviewed the record and find no reversible error. Accordingly, we affirm on the reasoning of the district court. See Lane v. Wilson, No. CA-04-1255-2 (S.D.W. Va. Aug. 26, 2005); see also Wilson v. Bernet, ___ S.E. 2d __, 2005 WL 3092265 (W. Va. 2005) (holding that adverse expert witnesses are entitled to immunity for their testimony and participation in civil proceedings.) We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED **April 18, 2006**

No. 05-2092
CA-04-1255-2

JOHN A. LANE, MD, FACOG

Plaintiff – Appellant

v.

STEPHEN J. WILSON, MD; JOCK R. WHEELER, MD; KRIS LEE SPERRY, MD;
STEVEN F. GORDON, MD

Defendants – Appellees

ORDER

Appellant has filed a petition for rehearing.

The Court denies the petition for rehearing.

Entered for a panel composed of Judge Widener, Judge Niemeyer, and Judge King.

For the Court,

/s/ Patricia S. Conner
CLERK